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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 EASTERN DIVISION  
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12 EVA TRINI PLAZA-GUTIERREZ, ) No. EDCV 08-597 CW  
13 )  
14 Plaintiff, ) DECISION AND ORDER  
15 v. )  
16 )  
17 MICHAEL J. ASTRUE, )  
18 Commissioner, Social )  
19 Security Administration, )  
20 )  
21 Defendant. )  
22 \_\_\_\_\_ )  
23  
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25 The parties have consented, under 28 U.S.C. § 636(c), to the  
26 jurisdiction of the undersigned magistrate judge. Plaintiff seeks  
27 review of the denial of disability benefits. The court finds that  
28 judgment should be granted in favor of defendant, affirming the  
Commissioner's decision.

24 I. BACKGROUND

25 Plaintiff Eva Trini Plaza-Gutierrez was born on August 5, 1958,  
26 and was forty-nine years old at the time of her administrative  
27 hearing. [Administrative Record ("AR") 18, 271.] She has eleven years  
28 of education and past relevant work experience as a packer, home care

1 provider, deli cashier and machine operator. [AR 18, 115.] Plaintiff  
2 alleges disability on the basis of fibromyalgia, carpal tunnel,  
3 arthritis, back problems, high blood pressure, severe allergies, bone  
4 spurs in her right heel, left ankle pain and memory loss. [AR 32.]

## 5 **II. PROCEEDINGS IN THIS COURT**

6 Plaintiff's complaint was lodged on April 30, 2008, and filed on  
7 May 9, 2008. On November 17, 2008, defendant filed an answer and  
8 Plaintiff's Administrative Record ("AR"). On January 21, 2009, the  
9 parties filed their Joint Stipulation ("JS") identifying matters not  
10 in dispute, issues in dispute, the positions of the parties, and the  
11 relief sought by each party. This matter has been taken under  
12 submission without oral argument.

## 13 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

14 Plaintiff applied for disability insurance benefits ("DIB") and  
15 supplemental security income ("SSI") under Titles II and XVI of the  
16 Social Security Act on October 28, 2005, alleging disability since  
17 January 31, 1992.<sup>1</sup> [AR 10.] After the application was denied  
18 initially and on reconsideration, plaintiff requested an  
19 administrative hearing, which was held on October 29, 2007, before ALJ  
20 F. Keith Varni. [AR 271.] Plaintiff appeared with counsel, and  
21 testimony was taken from plaintiff and her daughter, Isabel Refermosa.

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23 <sup>1</sup> Plaintiff was last insured for Title II benefits on June 30,  
24 1993. [AR 11.] Plaintiff filed a previous DIB application that was  
25 denied by an Administrative Law Judge ("ALJ") decision, filed on  
26 February 27, 1997, which Plaintiff did not appeal. [Id.] In the  
27 present case, the ALJ noted that the prior decision was  
28 administratively final and found no cause to reopen the application  
pursuant to 20 C.F.R. § 404.988, such as new and material evidence  
relating to the previously adjudicated period. [Id.] Accordingly,  
Plaintiff's DIB claim was dismissed, and the Commissioner's evaluation  
was limited to the SSI claim. [Id.] Plaintiff does not appeal the  
Commissioner's decision to dismiss her DIB claim.

1 [AR 272.] The ALJ denied benefits in a decision dated December 3,  
2 2007. [AR 10-19.] When the Appeals Council denied review on April 7,  
3 2008, the ALJ's decision became the Commissioner's final decision.  
4 [AR 2-4.]

#### 5 IV. STANDARD OF REVIEW

6 Under 42 U.S.C. § 405(g), a district court may review the  
7 Commissioner's decision to deny benefits. The Commissioner's (or  
8 ALJ's) findings and decision should be upheld if they are free of  
9 legal error and supported by substantial evidence. However, if the  
10 court determines that a finding is based on legal error or is not  
11 supported by substantial evidence in the record, the court may reject  
12 the finding and set aside the decision to deny benefits. See Aukland  
13 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.  
14 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240  
15 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,  
16 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
17 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada  
18 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

19 "Substantial evidence is more than a scintilla, but less than a  
20 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence  
21 which a reasonable person might accept as adequate to support a  
22 conclusion." Id. To determine whether substantial evidence supports  
23 a finding, a court must review the administrative record as a whole,  
24 "weighing both the evidence that supports and the evidence that  
25 detracts from the Commissioner's conclusion." Id. "If the evidence  
26 can reasonably support either affirming or reversing," the reviewing  
27 court "may not substitute its judgment" for that of the Commissioner.  
28 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.



claimants in fully developing the record even if they are represented by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at 1288. If this burden is met, a prima facie case of disability is made, and the burden shifts to the Commissioner (at step five) to prove that, considering residual functional capacity ("RFC")<sup>2</sup>, age, education, and work experience, a claimant can perform other work which is available in significant numbers. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

#### B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE

Here, the ALJ found that plaintiff had not engaged in substantial gainful activity since her alleged disability onset date (step one); that plaintiff had a "severe" impairment of the musculoskeletal system (step two); and that plaintiff did not have an impairment or combination of impairments that met or equaled a "listing" (step three). [AR 13-14.] Plaintiff was found to have an RFC for a limited range of light work.<sup>3</sup> [AR 15.] Plaintiff could not perform her past

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<sup>2</sup> Residual functional capacity measures what a claimant can still do despite existing "exertional" (strength-related) and "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to work without directly limiting strength, and include mental, sensory, postural, manipulative, and environmental limitations. Penny v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

<sup>3</sup> The ALJ found that Plaintiff could lift and/or carry twenty pounds occasionally and ten pounds frequently; stand and/or walk at least two hours in an eight-hour workday and sit for about six hours in an eight-hour workday; cannot engage in repeated or constant wrist flexion/extension, supination/pronation, or turning or twisting; cannot repeatedly operate lower extremity controls; cannot engage in extreme or constant overhead reaching or stretching with the left upper extremity, but can do at or below shoulder level work 1/3 to 2/3 of the time; cannot engage in constant or repetitive power gripping or grasping, but should be able to use her hands for gross manipulation

1 relevant work (step four). [AR 18.] The vocational expert provided  
 2 evidence that a person with plaintiff's RFC could perform work  
 3 existing in significant numbers, such as a lens-block gauger, table  
 4 worker, addresser or call-out operator (step five). [AR 19.]  
 5 Accordingly, plaintiff was found not "disabled" as defined by the  
 6 Social Security Act. [Id.]

### 7 **C. ISSUES IN DISPUTE**

8 The parties' Joint Stipulation sets out the following disputed  
 9 issues:

- 10 1. Whether the ALJ properly considered Plaintiff's obesity and  
 11 its impact on her other impairments;
- 12 2. Whether the ALJ properly considered the chiropractor's  
 13 opinion regarding Plaintiff's multiple limitations;
- 14 3. Whether the ALJ properly considered Plaintiff's testimony  
 15 and made proper credibility findings; and
- 16 4. Whether the ALJ properly considered the lay witness  
 17 testimony.

18 [JS 3.]

### 19 **D. ISSUE ONE: OBESITY**

20 During an Orthopaedic Consultation performed in February 2006 by  
 21 Dr. Thomas Dorsey, Plaintiff was measured at sixty-one inches tall and  
 22 244 pounds.<sup>4</sup> [AR 205.] Medical records indicate that in August 2006,  
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24 1/3 to 2/3 of the time; should be able to perform activities such as  
 25 writing, turning pages, using a phone, and fingering larger objects;  
 26 cannot climb ladders, ropes or scaffolds, but can occasionally climb  
 27 ramps and stairs; can occasionally balance, stoop, kneel, crouch and  
 28 crawl; and has an unlimited ability to feel. [AR 15.]

<sup>4</sup> Although Plaintiff asserts a weight of 275 pounds, the records  
 cited indicate Plaintiff's highest weight was 247 pounds. [AR 146.]

1 Plaintiff was measured at 247 pounds. [AR 146.] In the Commissioner's  
2 decision, at step two of the five-step evaluation, the ALJ found that  
3 Plaintiff "is obese, but this condition does not limit her mobility or  
4 ability to function and imposes no greater limitations than those  
5 established herein." [AR 13.] Plaintiff asserts that the ALJ erred in  
6 failing to properly consider evidence of her obesity to the extent  
7 that it may combine with her other impairments to affect her  
8 functional capacity for work. [JS 3-6.]

9 Although obesity was removed from the Listing of Impairments in  
10 1999, the condition may still factor into a multiple impairments  
11 analysis by virtue of its interactive effect on a claimant's other  
12 impairments, "but only by dint of its impact upon the claimant's  
13 musculoskeletal, respiratory, or cardiovascular system." Celaya v.  
14 Halter, 332 F.3d 1177, 1181 n. 1 (9th Cir. 2003)(citing 64 Fed. Reg.  
15 46122-01, 1999 WL 637689). In Celaya, the ALJ's failure to consider  
16 evidence of the claimant's obesity in a multiple impairments analysis  
17 was reversible error because: (1) it was raised implicitly in the  
18 claimant's report of symptoms; (2) it was clear from the record that  
19 the claimant's obesity was at least close to the listing criterion;  
20 and was a condition that could exacerbate her reported illnesses; and  
21 (3) in light of the claimant's pro se status, the ALJ's observation of  
22 the claimant and the information on the record should have alerted him  
23 to the need to develop the record in respect to her obesity. Celaya,  
24 332 F.3d at 1182.

25 The fact that a claimant has obesity does not by itself trigger a  
26 duty to perform the interactive analysis. See Burch v. Barnhart, 400  
27 F.3d 676, 682 (9th Cir. 2005). A multiple impairments analysis with  
28 obesity is not required where, for example, the record does not

1 indicate that obesity exacerbates the claimant's other impairments, or  
2 the claimant is represented by counsel who fails to help develop the  
3 record. Burch 400 F.3d at 682, 683 (distinguishing Celaya when record  
4 did not indicate exacerbation of the claimant's other impairments by  
5 obesity, claimant was represented by counsel, and no evidence or  
6 theory of disability on the basis of obesity was set forth).

7 In this case, Plaintiff, who was represented by counsel  
8 throughout the proceedings, makes a general argument about the adverse  
9 effects of obesity but cites no evidence showing that Plaintiff's  
10 obesity could be a partial basis for disability. [JS 4.] Nor does the  
11 record suggest that Plaintiff's obesity exacerbated her other  
12 impairments to a degree greater than the ALJ's RFC finding, which  
13 imposed several functional limitations in consideration of Plaintiff's  
14 musculoskeletal disorder. Although Dr. Dorsey measured Plaintiff's  
15 weight at 244 pounds, Dr. Dorsey concluded that Plaintiff could stand  
16 and walk for four hours in an eight-hour workday, lift and carry  
17 twenty-five pounds occasionally and ten pounds frequently, bend and  
18 stoop on an occasional basis, and refrain from standing or walking on  
19 uneven ground; this functional assessment was less restrictive than  
20 the ALJ's RFC determination. [AR 208.] Under these circumstances, the  
21 ALJ's evaluation of the medical record was not erroneous. Burch, 400  
22 F.3d at 684 (finding proper consideration of evidence of claimant's  
23 obesity where ALJ noted evidence of claimant's weight in consideration  
24 of plaintiff's remaining maximum ability to do sustained work and  
25 claimant did not "set forth, and there is no evidence in the record,  
26 of any functional limitations as a result of her obesity that the ALJ  
27 failed to consider"). The ALJ "properly considered [Plaintiff's]  
28 obesity to the extent required based on the record," and this claim is



1 therefore without merit. Id.

2 **E. ISSUE TWO: CHIROPRACTOR'S OPINION**

3 In February 2007, Barbara Stanfield, a chiropractor, completed a  
4 Physical Capacities questionnaire regarding Plaintiff's functional  
5 limitations. [AR 118-19.] Ms. Stanfield wrote, among other things,  
6 that "prolonged periods of standing/walking aggravate low back,  
7 cervical and feet," "prolonged periods of sitting aggravate low back,"  
8 and that "the patient is unable to lift objects because no strength to  
9 hands or wrist." [AR 119.] The ALJ summarized Ms. Stanfield's opinion  
10 and rejected it for the following reasons: Ms. Stanfield is a  
11 chiropractor and had "no competence" in treating, diagnosing, or  
12 assessing upper extremity impairments; a chiropractor is not an  
13 "acceptable medical source" to provide a medical opinion pursuant to  
14 20 C.F.R. § 416.913 but is considered an "other source"; Ms. Stanfield  
15 provided no treating records; Ms. Stanfield's opinion was inconsistent  
16 with Plaintiff's testimony, which was that she could walk "for a  
17 while," sit for at least an hour at a time, drive, run errands and do  
18 light housekeeping chores; and Ms. Stanfield's opinion was  
19 accommodative and "thoroughly rebutted" by the opinions of Dr. Dorsey  
20 and state agency physicians. [AR 17-18.]

21 Plaintiff makes the conclusory assertion that the ALJ "failed to  
22 properly consider" the opinion of Ms. Stanfield, without providing any  
23 argument for that assertion or even addressing the reasons cited by  
24 the ALJ to reject her opinion. [JS 9-10.] Because chiropractors are  
25 not "acceptable medical sources," as defined by the Commissioner's  
26 regulations, their reports are defined as "information from other  
27 sources" that may also be considered. See 20 C.F.R. § 416.913(a)&(d).  
28 The ALJ has discretion to determine the appropriate weight to accord a

1 chiropractor's opinion. Diaz v. Shalala, 59 F.3d 307, 313-14 (9th  
2 Cir. 1995). Review of the record supports the conclusion that the  
3 rejection of Ms. Stanfield's opinion was a proper exercise of the  
4 ALJ's discretion that satisfied the Ninth Circuit standard for the  
5 evaluation of chiropractic evidence. Accordingly, this claim is  
6 without merit.

7 **F. ISSUE THREE: CREDIBILITY**

8 During the hearing, Plaintiff testified that she has daily  
9 problems with pain in her lower back, knees and feet; that "all I do"  
10 is lay down during the day; that she has constant fatigue; that her  
11 medications make her drowsy; that she has shortness of breath; and  
12 that she has problems with concentration. [AR 274-76.]

13 The ALJ found that this testimony was "not fully credible" for  
14 the following reasons. First, the ALJ stated that the assertions were  
15 unsupported by established pathology, explaining that Plaintiff had  
16 two surgeries for carpal tunnel syndrome that helped alleviate her  
17 symptoms, an MRI of her back showed "only mild to moderate  
18 degenerative disc disease," and x-rays of her right foot "showed  
19 nothing more than mild degenerative changes and mild hallux valgus  
20 deformity." [AR 16.] Second, the ALJ found that Plaintiff's testimony  
21 was indicative of gross exaggeration, later citing as an example a  
22 treatment note from July 2004 stating that Plaintiff initially held  
23 her neck quite stiffly but that later in the visit she was "moving  
24 about quite easily." [Id.; AR 167.] Third, the ALJ found that  
25 Plaintiff's testimony that she was required to lay down all day was  
26 inconsistent with Plaintiff's activities of daily living as reported  
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1 to the examining psychiatrist.<sup>5</sup> [AR 16.] Fourth, the ALJ noted that  
2 Plaintiff's pain allegations were inconsistent with Dr. Dorsey's  
3 finding of few significant abnormalities and treatment notes  
4 indicating problems that resolves quickly with minimal treatment. [AR  
5 16-17.] Plaintiff asserts that "the ALJ rejected Plaintiff's  
6 testimony without providing legally sufficient reasons." [JS 12-13.]

7 Questions of credibility and resolution of conflicts in the  
8 testimony are functions solely for the ALJ. Parra v. Astrue, 481 F.3d  
9 742, 750 (9th Cir. 2007) (citing Sample v. Schweiker, 694 F.2d 639,  
10 642 (9th Cir. 1982)). To determine whether a claimant's subjective  
11 symptom testimony is credible, the ALJ must engage in a two-step  
12 analysis. Lingenfelter v. Astrue, 504 F.3d 1038, 1036 (9th Cir.  
13 2007). First, the ALJ must determine whether the claimant has  
14 presented objective medical evidence of an underlying impairment  
15 "which could reasonably be expected to produce the pain or other  
16 symptoms alleged." Id. (quoting Bunnell v. Sullivan, 947 F.2d 341,  
17 344 (9th Cir. 1991)). Second, if the claimant meets this first test,  
18 and there is no evidence of malingering, "the ALJ can reject the  
19 claimant's testimony about the severity of her symptoms only by  
20 offering specific, clear and convincing reasons for doing so."  
21 Lingenfelter, 504 F.3d at 1036 (quoting Smolen v. Chater, 80 F.3d  
22 1273, 1281 (9th Cir. 1996)); see also Parra, 481 F.3d at 750; Holohan

23 \_\_\_\_\_  
24 <sup>5</sup> Plaintiff told the psychiatrist that she is able to do  
25 household chores, cook and make snacks, dress and bathe herself, go to  
26 the store, and run errands. For transportation, she drives a car and  
27 drove herself to the examination. Other activities include going to  
28 the movies on occasion and watching television. Plaintiff also stated  
that she can handle bills and cash appropriately, leave home alone,  
and gets along with family but not friends and neighbors. Plaintiff  
reported making her bed sometimes, falling asleep while watching  
television, and that she has trouble sleeping at night. [AR 135.]

1 v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001). An ALJ must  
2 "specifically identify" the testimony found not credible, the ALJ must  
3 "explain what evidence undermines the testimony," and the evidence on  
4 which the ALJ relies must be "substantial." Parra, 481 F.3d at 750;  
5 Tonapetyan, 242 F.3d at 1148 ("The ALJ must give specific, convincing  
6 reasons for rejecting the claimant's subjective statements."); Light  
7 v. Social Security Admin., 119 F.3d 789, 792 (9th Cir. 1997).

8 Although Plaintiff addresses none of the reasons provided by the  
9 ALJ to discount Plaintiff's testimony and provides no argument for the  
10 assertion that the ALJ's credibility evaluation was not legally  
11 sufficient, a review of the record indicates that the ALJ provided  
12 clear and convincing reasons under the Ninth Circuit standard. See  
13 Tommasetti v. Astrue, 533 F.3d 1035, 1040 (9th Cir. 2008) ("The ALJ may  
14 rely on ordinary techniques of credibility evaluation"); Burch v.  
15 Barnhart, 400 F.3d at 681 ("Although lack of medical evidence cannot  
16 form the sole basis for discounting pain testimony, it is a factor  
17 that the ALJ can consider in his credibility analysis."); Tonapetyan,  
18 242 F.3d at 1148 (9th Cir. 2001) (holding that the ALJ can rely on  
19 inconsistent statements in testimony in credibility evaluation).  
20 Accordingly, this issue is without merit.

21 **G. ISSUE FOUR: THIRD PARTY TESTIMONY**

22 At the hearing, Plaintiff's daughter, Ms. Refermosa, testified  
23 that she sees Plaintiff everyday and that Plaintiff was constantly in  
24 pain, limping or laying down; that Plaintiff was "very depressed" and  
25 crying; that Plaintiff required help in doing household chores such as  
26 washing dishes, cooking and cleaning; and that Plaintiff had memory  
27 problems. [AR 277.] The ALJ found that Ms. Refermosa did not provide  
28 "any information sufficiently persuasive to suggest the claimant would

1 be unable to perform work within the limitations set forth above." [AR  
2 18.] The ALJ noted that Ms. Refermosa's testimony was inconsistent  
3 with Plaintiff's prior statements indicating she was "quite active and  
4 engages in a fairly wide range of activities," including talking to  
5 her relatives, doing household chores, preparing meals and going  
6 grocery shopping. [Id.] The ALJ concluded that Plaintiff's ability to  
7 do these activities "does not necessarily establish an ability to  
8 obtain and maintain employment," but that it "does suggest she is not  
9 as incapacitated by her impairments as she alleges" and is capable of  
10 performing activities consistent with the mental and physical demands  
11 of work. [Id.] Plaintiff asserts that the ALJ "failed to properly  
12 consider" this testimony. [JS 16-17.]

13 Descriptions of friends and family members in a position to  
14 observe a plaintiff's symptoms and daily activities are competent  
15 evidence and must be considered in determining how an impairment  
16 affects a plaintiff's ability to work. Stout v. Commissioner, 454  
17 F.3d 1050, 1053 (9th Cir. 2006); Smolen v. Chater, 80 F.3d 1273, 1288-  
18 89 (9<sup>th</sup> Cir. 1996); Dodrill v. Shalala, 12 F. 3d 915, 918-19 (9<sup>th</sup> Cir.  
19 1993); Sprague v. Bowen, 812 F.2d 1226, 1232 (9th Cir. 1987); 20  
C.F.R. §416.913(d)(4). An ALJ may expressly determine to disregard a  
21 lay opinion if he gives a reason germane to the witness. Lewis v.  
22 Apfel, 236 F.3d 503, 511 (9th Cir. 2001); Nguyen v. Chater, 100 F.3d  
23 1462, 1467 (9th Cir. 1996); Dodrill, 12 F.3d at 919.

24 Plaintiff provides no reasons in support of the assertion that  
25 the ALJ failed to properly consider Ms. Refermosa's testimony, but a  
26 review of the record reveals that the ALJ provided reasons germane to  
27 that witness to reject her testimony, as required by the Ninth Circuit  
28 standard. Accordingly, this issue is without merit.

